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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VIMAL NAND REDDY, Defendant and Appellant.	A103851 (San Mateo County Super. Ct. No. SC051458)

Defendant Vimal Reddy was convicted on 26 counts arising from two separate instances of domestic violence against his girlfriend, B. On appeal he argues that the trial court erred in admitting evidence of prior acts of domestic violence, in giving certain jury instructions, and in refusing to allow him to examine B. in a particular manner. Reddy also challenges his sentence under the recent Supreme Court decision of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*). We conclude there were no errors in the conduct of the trial or in sentencing that require reversal of the judgment.

BACKGROUND

On May 8, 2002, Reddy was charged in a 26-count indictment in connection with two separate alleged incidents of domestic violence against B. The first incident occurred on March 2, 2001, and the second incident occurred on February 20, 2002. In connection with the latter events, Reddy was charged with seven counts of forcible oral copulation

(Pen. Code, § 288a, subd. (c)(2))[1] (counts 1-7); six counts of forcible digital penetration (§ 289, subd. (a)(1)) (counts 8-13); one count of attempted forcible digital penetration (§§ 664 & 289, subd. (a)(1)); five counts of felony criminal threats (§ 422) (counts 15-19); attempted dissuasion of a witness (§ 136.1, subd. (b)(1)) (count 20); felony domestic abuse with a prior domestic abuse conviction (§ 273.5, subd. (a)) (count 21); violation of personal liberty (§ 236) (count 22); and use of a vehicle without authority (Veh. Code, § 10851, subd. (a)) (count 23). In association with the events of March 2, 2001, Reddy was charged with two counts of rape (§ 261, subd. (a)(2)) (counts 24-25); and felony domestic abuse with a prior domestic abuse conviction (§ 273.5, subd. (a)) (count 26).

B. testified at length about her relationship with Reddy. The two started dating and began living together in 1999. In 2000, Reddy and B. had an argument while in their home, and Reddy blocked the door to prevent B. from leaving. She asked him repeatedly, "Please, could I just leave the room?" She testified that Reddy then "had me on the floor in a ball and just kicked me repeatedly" on her legs and arms. While he kicked her, he was calling her, "You stupid fucking bitch." B. was crying and saying, "Please stop." When Reddy stopped kicking her, he began crying, hugging and holding B., but still refusing to let her leave the room. B told him that she wanted to break up with him, but Reddy told her "You can't leave me. . . . If I can't have you, no one will." B. testified that she did not call the police because she was shocked and embarrassed.

B. testified that on July 12, 2000, she and Reddy fought because Reddy wanted his brother and cousin to come to their house, which B did not want because she believed they were using drugs. Reddy again trapped her in their bedroom. He pinned her down and slapped, strangled, hit and kicked her. While choking her, Reddy told B. that he wanted to kill her. B. testified that at the time she was "a couple months" pregnant. Reddy also threw the knickknacks that were on the dresser onto the floor, then told B., "You fucking stupid bitch. Now pick up your shit." Reddy then left the room, and B. left the house and got into her car. As she started to drive away, Reddy ran up to the car. B.

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

had locked the doors, but Reddy climbed on top of the car and started banging on it with a telephone he was holding. B. began driving slowly, but Reddy continued to bang on the windshield with the phone. B. sped up in hopes that Reddy would fall off the car, but he did not. When she spotted an ambulance and yelled for help, Reddy ran. B. found a police car and reported the incident.

B. testified to another violent incident when she was approximately seven months pregnant. Reddy became very angry while the couple was out, and when they arrived home grabbed B. and forced her into the bedroom where he threw her onto the mattress. He "shook me, strangled me, kicked me, couldn't stop kicking me, wouldn't stop, slapped me, kicked me, hit me, and I was just so scared, and I had my hands wrapped around my stomach the whole time." B. did not call the police after this incident because, she testified, she was "[t]otally scared. I was just about to have a baby. I wanted to pretend like—I know it's my fault, but I wanted to pretend like everything was just going to be grand."

B. had been due to give birth on February 21, 2001. On March 1, still pregnant, she went to the store to rent a movie. When she returned, Reddy was drinking. She believed she was going into labor and said to Reddy, "I'm not trying to make a false alarm, Vimal, but I might have to go to the hospital tonight." When Reddy finished watching the movie, he told B. that he wanted to have sex, but she protested. Reddy then pinned her on the couch, grabbed her arms and pushed her into the bedroom. There, he ordered her to orally copulate him. He continued to repeat his commands while B. was crying and pleading, "Please don't do this to me." Reddy told B. to "bend over" then turned her around. At some point he hit her on the legs and on the eye. Reddy then forced B. to kneel on the bed and forced his penis into her mouth. He then pinned B. on the bed and forced his penis into her vagina. B. did not push him off or resist because her pregnancy was so advanced that she had trouble moving, and because she was afraid of hurting the baby.

At approximately 5:30 a.m. Reddy left in B.'s car. B. believed she was in labor while Reddy was assaulting her. When he left, she began cramping badly, but she waited

an hour and a half to phone her sister. At 8:00 that morning, she went to the hospital. She delivered the baby at 2:00 the following afternoon. Reddy was not present at the birth. B. did not report the incidents of March 1 to the police because she was humiliated, and because she did not want to go to the police station while she was in labor and talk "to them about how I had just been raped and beaten."

Reddy then moved out of their home for approximately six months, returning on September 30 or October 1, 2001. He stayed there until February 2002, when B. asked him to leave because she felt that he was going to become abusive again. Reddy moved in with his brother at a hotel, but after a few days asked B. to come pick him up. Although she did not want to do so, he told her that if she did not, he would come to her house anyway. B. testified she was afraid of him. On the evening on February 19, 2002, in her car, Reddy told B. about a new video game in which the characters rape and kill women. This frightened B. That night, B. asked Reddy to move out of the house permanently.

Early in the morning on February 20, Reddy became angry. He told B., "I'm going to fucking rape you and fucking have my way with you, and shove my dick in you, in all three holes of your body, until you rip." He also told her, "I'm going to have my way with you, and then I'm going to kill you." B. was afraid he would kill her. Reddy held B. down and told her, "I'm going to get what I want. I'm going to get it good." Reddy ordered B. to undress. She cried and told him she would not, but he began hitting and shaking her and told her that if she did not get undressed "he was going to have his way with me and kill me."

Reddy pulled B. into the bathroom and ordered her to orally copulate him. B. resisted but he forced her to do so. She was afraid Reddy would kill her if she refused. At one point, Reddy removed his penis entirely from her mouth, then put it back in. Reddy then got a video camera. B. said, "Oh God, please don't do this to me." Reddy told her that he was going to make a video tape of him having sex with B. and put it on the Internet. B. tried to cover her body when he began filming.

At some point, Reddy and B. returned to the bedroom. B. tried to use the telephone to call the police, but Reddy grabbed it and hit B. with it. Reddy told her that if she tried to make another call he would kill her. B. was on the bedroom floor and Reddy sat on her face and put his penis in her mouth. Reddy told B. that if she did not do exactly what he wanted her to do, he would rewind the video tape and refilm until she "got it right." Reddy then ordered B. to stand, bend over and spread her legs. B. tried to run, but Reddy grabbed her and pulled her back. He then threw her on the bed, saying, "You try to leave again, and I'll fucking kill you." He slapped her, then made her kneel. Again, Reddy forced B. to orally copulate him. Reddy then sat down on the bed, holding the video camera and forced B. to orally copulate him in that position. B. asked him to stop, while Reddy repeatedly stated that "this looks great."

Reddy also ordered B. to touch her genitals and her anus, again telling her that if she "didn't do it right he would continue to rewind the tape" until she did. On Reddy's orders she repeatedly touched her vagina. At least three times Reddy put his finger inside B.'s vagina, against her wishes.

The couple's one-year-old daughter was in the bedroom while these incidents took place. B. told her, "Please don't watch," and said to Reddy, "Please don't do this in front of her."

The episode ended when B.'s sister let herself into the house. When B. heard her, she screamed, "Call the police." Reddy said, "No, no, no. Don't do that." Although she was not wearing any clothes and had only a blanket wrapped around her, B. ran out of the house. Reddy dressed and ran out of the house shortly thereafter and drove away in B.'s car. B. asked a neighbor to call the police. Reddy was arrested a few blocks from the house. Later that morning, B. went to the hospital and gave a statement to the police.

After his arrest, Reddy sent B. numerous letters and called her more than 50 times. Reddy told B., "Just lie. You don't have to do this. I want to be there for our family. You know, I know what I did to you was wrong. I'm sorry. I'll never do it again." He also told her, "I'll be mad if you don't do these things, and you know what's going to happen next."

In his defense, Reddy called only one witness. His aunt testified that Reddy was married when he and B. began dating, and that B. knew he was married. She also testified that at a party she observed B. looking at some pictures of a couple having sex, and that she was laughing while she looked at them. She further testified that she had once seen B. hit Reddy while they were arguing and that B. was upset when Reddy was not present in the hospital for the birth of their child. His aunt testified that B. did not mention to her that Reddy had raped her the night before she gave birth.

In closing, Reddy argued that both incidents were consensual and that he and B. had discussed making a "rape" video, although there was no evidence to this effect and B. had explicitly denied that she and Reddy ever discussed making such a video.

The jury found Reddy guilty on all counts and found the allegation of a prior conviction for domestic violence to be true. The court sentenced Reddy to 56 years in prison. Reddy timely appealed.

DISCUSSION

Prior acts of domestic violence

Reddy first argues that Evidence Code section 1109, which permits the trial court to admit evidence of prior acts of domestic violence, violates his constitutional rights to due process, equal protection, and a fair trial in that it lowers the burden on the prosecution to prove its case. The Attorney General argues that Reddy waived this issue by failing to object to the admission of the evidence at trial. Regardless, Reddy acknowledges that our Supreme Court has rejected a similar argument addressed to Evidence Code section 1108, which permits admission of prior sex crimes when the defendant is charged with a similar offense. (*People v. Falsetta* (1999) 21 Cal.4th 903.) In *Falsetta*, the Supreme Court concluded that Evidence Code section 1108 is constitutionally valid because, "Although this provision represents a deviation from the historical practice of excluding such 'propensity' evidence (see [Evid. Code,] § 1101, subd. (a)), the provision preserves trial court discretion to exclude the evidence if its prejudicial effect outweighs its probative value ([Evid. Code,] § 352)." (21 Cal.4th at p. 907.) This court and others have applied the reasoning of *Falsetta* to Evidence Code

section 1109. (See, e.g. *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1030.) Reddy also concedes that *Falsetta*'s reasoning applies equally to Evidence Code section 1109, but asserts the argument in order to preserve it. We see no reason to depart from this precedent. We reject Reddy's attack on the validity of Evidence Code section 1109 and his contention that evidence of prior acts of domestic violence was erroneously received.

CALJIC Nos. 2.50.02 and 2.50.01

Reddy next contends that the trial court erred in instructing the jury with the 2002 revision of CALJIC No. 2.50.02 and with CALJIC No. 2.50.01 because the instructions permitted the jury to convict him of the domestic violence and sexual offenses merely because it found that he had committed prior acts of domestic violence and sexual offenses. The trial court instructed the jury with CALJIC No. 2.50.02 as follows: "If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit another offense involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offense. And that would be those offenses in counts 21 and 26. If you determine an inference can properly be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant had been proved guilty beyond a reasonable doubt, of these charges." CALJIC No. 2.50.01 is virtually identical, but substitutes "sexual offense" for "offense involving domestic violence."

Reddy also failed to object to these instructions at trial, but contends that he may challenge them for the first time on appeal. Whether or not he has waived the objection, it has no merit. Reddy acknowledges that the Supreme Court has approved the use of

CALJIC No. 2.50.02 and by analogy CALJIC No. 2.50.01 and states that he is asserting the error merely to preserve it. (See *People v. Reliford* (2003) 29 Cal.4th 1007.)

Cross-examination of B.

Reddy next challenges the trial court's refusal to make B. watch the videotape of the events of February 20, 2002, during her cross-examination. Before trial, the prosecution made a "Motion to Protect the Victim From Undue Embarrassment and Harassment." In that motion, the prosecution asked that B. not be made to watch the video tape, but that it be played for the jury when B. was not in the courtroom. Reddy argued that he should be permitted to show B. the video and stop it in various places to ask her at those points in the events, "Did you consent or did you not consent." The trial court pointed out that B.'s position was that she had never consented and therefore, "looking at the videotape is not going to change her mind about whether she consented or not." The court ruled that B. would not be required to watch the videotape while it was shown to the jury during her cross-examination, but that the defense attorney "would be able to place yourself while conducting cross-examination so that you can observe the video tape. You can stop it where you wish and you can ask specific questions. The jury will be able to see and mindful of observing the alleged victim's facial expressions and they are ultimately going to conclude whether or not the victim consented."

The trial court based its ruling on its authority under Evidence Code section 765, subdivision (a) to control the interrogation of witnesses. That section provides that "The court shall exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment."

Although he ultimately did not play the videotape during B.'s testimony, Reddy argues that this ruling violated his right under the Sixth Amendment to confront the witness. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have

long been recognized as essential to due process." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) "Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." (*Id.* at p. 295.)

Reddy relies on *People v. Murphy* (2003) 107 Cal.App.4th 1150, in which the court reversed a conviction based on the fact that the accusing witness in a sexual assault trial was permitted to testify from behind one-way glass. In holding that this procedure violated the defendant's right to confront the witness, the court held that the confrontation clause guarantees the accused the right to a face-to-face confrontation with the accuser. The court emphasized, quoting the Supreme Court, that " '[t]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." ' " (*Id.* at p. 1154.) The *Murphy* court looked for guidance to *Maryland v. Craig* (1990) 497 U.S. 836, in which the Supreme Court upheld a statute that permitted a child victim of sexual assault to testify via closed circuit television. The *Craig* court "found it significant that the Maryland procedure preserved all other elements of the right to confrontation, namely the requirement that a witness testify under oath, the opportunity for contemporaneous cross-examination, and the opportunity for the triers of fact and defendant to observe the witness's demeanor during testimony." (*Murphy, supra,* 107 Cal.App.4th at p. 1155.) Ultimately, the court in *Murphy* concluded that the defendant's right to confront his accuser had been violated, distinguishing the case from *Craig* on the ground that the accuser in *Craig* was a child. (*Murphy, supra,* at p. 1157.)

In this case, B. was an adult and therefore not entitled to any special protections. However, Reddy's right to confront her was not infringed. B. testified at length while Reddy was present in the courtroom, Reddy had the opportunity to cross-examine her, and the jury was able to observe B.'s demeanor. All of the elements identified in *Murphy* were present, in addition to the opportunity for face-to-face confrontation. Neither at trial nor on appeal has Reddy articulated any particular questions that he wished to put to B. that the court's ruling precluded him from asking. The court's ruling that B. not be

required to view the videotape did not limit Reddy's right of confrontation, and was well within the trial court's authority under Evidence Code section 765 to control the manner in which testimony is received. In any event, having chosen not to make any use of the videotape during cross-examination, it is doubtful that the issue has been preserved for appeal. (Cf. *People v. Sims* (1993) 5 Cal. 4th 405, 454 ["if a defendant wishes to preserve for appeal an objection to a trial court's in limine ruling permitting impeachment by a prior conviction, he or she must take the witness stand and actually suffer such impeachment"].) In all events it is clear that no prejudice befell Reddy from the trial court's ruling.

Blakely Issues

Finally, Reddy submitted supplemental briefing challenging his sentence under the Supreme Court's recent decision in *Blakely*, *supra*, 542 U.S. ___ [124 S.Ct. 2531]. There, the court affirmed its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely* applied the rule of *Apprendi* to a sentencing scheme similar to that used in California. The court reversed the defendant's sentence because he had received a sentence more than three years longer than the statutory "standard range" based on the trial court's finding that he had acted with "deliberate cruelty" when he kidnapped his wife. The court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely, supra,* at p. ___ [124 S.Ct. at p. 2537].) The court explained, "Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial." (*Id*. at p. ___ [124 S.Ct. at p. 2538].) "[E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." (*Id.* at p. ___ [124 S.Ct. at p. 2543].) Because the fact that the defendant had acted with "deliberate cruelty" had not been found by the

jury nor admitted by the defendant, the high court found that the additional three year term violated Blakely's right to a jury trial under the Sixth Amendment.

There is currently a split among the district Courts of Appeal on whether and the extent to which *Blakely* applies to California's sentencing scheme. (Compare, e.g., *People v. Juarez* (2004) 124 Cal.App.4th 56 with *People v. Picado* (2004) 123 Cal.App.4th 1216.) Pending Supreme Court clarification, we believe that *Blakely* and *Apprendi* apply when the upper term under California's determinate sentencing law is imposed, and that we therefore must examine the basis on which such a sentence is imposed to determine whether the right to have a jury determine the facts on which the sentence was increased has been violated.

a. Imposition of the upper term

Reddy was sentenced to the upper term on each of the 26 counts. We first reject the Attorney General's argument that Reddy waived this issue by not raising it at trial. *Blakely* was decided well after the trial, and therefore the argument is preserved for appeal despite the fact that he did not make the objection below. (See *People v. Picado, supra*, 123 Cal.App.4th at pp. 36-37 ["*Blakely* was not decided until after Picado was sentenced. As of that time, there was no reported decision holding that an upper term sentence violated the Sixth Amendment if premised on factors found by the trial court rather than a jury. California courts and numerous federal courts held there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. [Citation.] To be sure, *Blakely* has been described as having 'worked a sea change in the body of sentencing law' "].)

In selecting the upper terms here, the court relied on many factors that *Blakely* rendered impermissible without an explicit jury finding, such as viciousness of the crime and vulnerability of the victim. However, the trial court also relied on the facts that Reddy had served a prior prison term, that he was on parole when the 2001 attack occurred, and that he had multiple probation violations. The probation report reveals five prior convictions, including one for false imprisonment (§ 273, subd. (a)) arising from

another incident of domestic violence against B. Further, the court found that there were no mitigating circumstances.

Apprendi and *Blakely* explicitly state that the fact of a prior conviction need not be found by a jury. (*Blakely*, *supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2536], citing *Apprendi, supra,* 530 U.S. at p. 490.) The exception to the *Apprendi* rule for prior convictions has been construed to apply to other facts related to a defendant's recidivism. (See, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223 and *People v. Vu* (Dec. 9, 2004, G033583) __ Cal.App.4th __ [2004 Cal.App. Lexis 2087]; but see *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1586 ["we do not perceive the phrase 'the fact of a prior conviction' to have a broad meaning including all recidivist circumstances"].) Further, a single aggravating factor is sufficient for the trial court to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) So long as the trial court had one permissible reason for imposing the upper term, we may affirm. (*People v. Price* (1991) 1 Cal.4th 324, 492.) Because there were several recidivist factors that justified imposition of the upper terms without implicating *Blakely*, we uphold the trial court's imposition of the aggravated terms for Reddy's offenses.

b. Consecutive sentences

Reddy also argues that the trial court violated the mandate in *Blakely* when it imposed consecutive sentences for three of the counts of forced oral copulation (counts one, two, and four), and three of the counts of forced digital penetration (counts eight, nine, and ten.) The applicability of *Blakely* to consecutive sentences is currently pending before our Supreme Court in several cases. (*People v. Black* (June 1, 2004, F042592) [nonpub. opn.], review granted July 28, 2004, S126182; *People v. Sykes* (2004) 120 Cal.App.4th 1331, review granted Oct. 20, 2004, S127529; *People v. Vonner* (2004) 121 Cal.App.4th 801, review granted Oct. 20, 2004, S127824; *People v. Ochoa* (2004) 121 Cal.App.4th 1551, review granted Nov. 17, 2004, S128417; and *People v. Sample* (2004) 122 Cal.App.4th 206, review granted Dec. 1, 2004, S128561.) The California Courts of Appeal that have thus far considered whether imposition of consecutive sentences violates *Blakely* have found that it does not. (See *People v. Prieto* (Dec. 7, 2004,

B172963) __Cal.App.4th __ [2004 Cal.App. Lexis 2076] (*Prieto*); *People v. Jaffe, supra,* 122 Cal.App.4th at pp. 1588-1589; and *People v. Dalby* (2004) 123 Cal.App.4th 1083, 1103.)

The trial court in this case imposed fully consecutive sentences on six counts pursuant to section 667.6, subdivision (d) and California Rules of Court, rule 4.426(a)(2). Section 667.6, subdivision (d) provides for the mandatory imposition of "full, separate, and consecutive" sentences for multiple violent sexual offenses, including rape (§ 261), oral copulation by force, violence, duress, menace or fear (§ 288a), and forcible digital penetration (§ 289, subd. (a)), "if the crimes involve . . . the same victim on separate occasions." Rule 4.426 of the California Rules of Court provides that "full, separate, and consecutive term[s] shall be imposed for each violent sex offense committed on a separate occasion" against the same victim. In deciding whether offenses occurred on separate occasions, "the sentencing judge shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (*Ibid*.) Section 667.6, subdivision (d) provides for the same considerations.

The trial court made specific findings that Reddy had a reasonable opportunity to reflect between the commission of each of the offenses for which it imposed a fully consecutive sentence. It made the additional finding that "if for some reason the court was incorrect in finding these crimes, given the opportunity to reflect under 667.6(d), the court would have chosen for those counts, to give him full and consecutive sentence anyway, under 667.6(c)." That section provides that "a full, separate, and consecutive term may be imposed for each violation of [certain offenses, including those at issue in this case] whether or not the crimes were committed during a single transaction." Subdivision (c) of section 667.6 provides the trial court with wide discretion to impose consecutive sentences without making additional factual findings. (See, e.g., *People v. Belmontes* (1983) 34 Cal. 3d 335, 347-348; *People v. Tassell* (1984) 36 Cal. 3d 77, 91 [section 667.6, subdivision (c) "allows the court in its discretion to sentence a defendant to full term consecutive sentences rather than the 'one-third of the middle term'

consecutive sentence formula set forth in section 1170.1, subdivision (a)"], overruled on other grounds by *People v. Ewoldt* (1994) 7 Cal.4th 380, 401, fn. 5.)

In *Prieto* the court considered the issue in the context of fully consecutive sentences imposed under section 667.6, subdivision (c). The court observed that section 667.6, subdivision (c) "permits a court to impose a full strength consecutive sentence for enumerated violent sex offenses '. . . whether or not the crimes were committed during a single transaction.' " (*Prieto, supra,* __Cal.App.4th __ [2004 Cal.App. Lexis at pp. 3-4].) In affirming the imposition of consecutive sentences, the court relied on the fact that "[t]he jury's verdict on the penetration count established every fact necessary to trigger the applicability of section 667.6, subdivision (c); unlike the constitutionally invalid enhancements in *Apprendi* and *Blakely*, no fact other than the conviction itself needed to be established." (*Prieto, supra,* at p. __ [2004 Cal.App. Lexis at p. 11].) In a footnote, the *Prieto* court expressly stated that it was not deciding the propriety of a consecutive sentence imposed under section 667.6, subdivision (d) because the defendant in that case was convicted of only one violent sex offense. (*Ibid.*, fn. 2.)

We agree with *Prieto,* that since the exercise of the court's discretion under subdivision (c) does not require an additional finding of fact, *Blakely* did not affect the propriety of the court imposing fully consecutive sentences under that provision without further recourse to the jury. Since the trial court here explicitly stated that it would have imposed fully consecutive terms under subdivision (c) whether or not mandated by subdivision (d), it is unnecessary to decide whether *Blakely* would require jury findings before imposing fully consecutive terms under subdivision (d).

DISPOSITION

The judgment is affirmed.

_____
Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Parrilli, J.